EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JORDAN MARKS, etc., Plaintiff, v. CRUNCH SAN DIEGO, LLC, Defendant.	No. 14-CV-348-BAS October 21, 2014 2:02 p.m. San Diego, California

Transcript of Summary Judgment
BEFORE THE HONORABLE CYNTHIA BASHANT
United States District Judge

APPEARANCES:

For the Plaintiff: KAZEROUNI LAW GROUP, APC
By: ABBAS KAZEROUNIAN, ESQ.
245 Fischer Ave., Ste. D1
Costa Mesa, CA 92626

- and -

HYDE & SWIGART
By: JOSHUA SWIGART, ESQ.
2221 Camino Del Rio S, Ste. 101
San Diego, CA 92108

For the Defendant: GREENBERG TRAURIG LLP
By: IAN CHARLES BALLON, ESQ.
2450 Colorado Ave., Ste. 400E
Santa Monica, CA 90404

Court Reporter: Dana Peabody, RDR, CRR
District Court Clerk's Office
333 West Broadway, Suite 420
San Diego, California, 92101
DanaPeabodyCSR@gmail.com

Reported by Stenotype, Transcribed by Computer

San Diego, California, October 21, 2014

* * *

THE COURT: Good afternoon.

THE CLERK: Calling matter number 2, 14-CV-0348, Marks versus Crunch San Diego, LLC on calendar for motion hearing.

THE COURT: Counsel, appearances for the record, please.

MR. KAZEROUNIAN: Abbas Kazerounian for the plaintiff.

MR. SWIGART: And Josh Swigart for the plaintiff as well.

MR. BALLON: Ian Ballon for the defendant, and with me is Lori Chang.

THE COURT: Good afternoon. Okay. This is set for a motion for summary judgment, and I reviewed the defendant's motion for summary judgment with all the attachments and the exhibits, the plaintiff's response with all the attachments and the exhibits, and the defendant's reply with the attachments and the exhibits, and it appears to me, and you can tell me if I'm wrong, that there isn't really any question of fact in this case, at least as far as the individual legal issue goes.

Everyone agrees, first of all, and, again, correct me if I'm wrong, that the text communication platform stored numbers inputted by various human beings and then sent a group text message to the stored numbers; and, number two, the platform could only send messages to specific phone numbers

inputted by some authorized person. It's not like they purchased some big telephone numbers from a third party; third, the platform does not generate any numbers at all. The platform cannot send text messages to random numbers; the platform cannot send text messages generated from a random or sequential number generator; and it's not predictive dialing.

So ultimately this particular motion for summary judgment turns on the purely legal question of the meaning of the statutory definition of an automatic telephone dialing device or whatever it's called, ATDS, as applied to these facts and what using a random or sequential number generator means and what that phrase is modifying, whether it's solely production or production and storage of numbers.

Does everyone agree that's at least the issue? Plaintiff?

MR. KAZEROUNIAN: That's accurate.

THE COURT: Defendants?

MR. BALLON: Yes, with one caveat. I'm not sure what the Court meant by "group text" because it would be possible to use this system to send a text message to one person or to multiple people, but otherwise we're in full agreement. It's a legal question.

THE COURT: It could be used to send to one number although there really wouldn't be any point to just have text communication. The whole point is to send out a big email to

everyone, right?

MR. BALLON: No, I think --

THE COURT: I used the term "email" just because I'm technically not adept, but you know what I mean.

MR. BALLON: No, I think it can be used just for one or for small numbers or for a group email.

THE COURT: So let me hear from the plaintiff. Since I think I know the issue, I'm sorry, let me hear from the defendants first as to why you think this should be granted.

MR. BALLON: Thank you, Your Honor.

The facts are not in dispute, and under *Satterfield* we believe we are entitled to summary judgment. The *Satterfield* decision has two aspects that are relevant to this case. The first is the Court's finding that the definition of ATDS is unambiguous and therefore under the Ninth Circuit, under the *Satterfield* precedent, because the definition is unambiguous, in the Ninth Circuit, courts are not supposed to look beyond the plain terms of the statute; and under the plain terms of the statute, it is undisputed that the system here does not generate numbers randomly or sequentially.

THE COURT: If it's true that the using of random or sequential number generator modifies both storing and producing numbers, what does it mean to store telephone numbers using a random or sequential number generator? What does that mean? How do you store a number using a random sequential number

MR. KAZEROUNIAN: Arguably so, Your Honor. I'm not saying it's within the realm of what congress intended, and I would never --

THE COURT: I'm curious. When people do group messages, group text messages, and they get a big group of people, then that's using an automatic telephone dialing generator?

MR. KAZEROUNIAN: Potentially, and I've heard experts use a cell phone as an example of how broad the FCC has made the definition. And that's not the analogy I would use per se, but I think you make a valid point. That's a point well-taken.

But going back to the construction of the statute, I think the comma was put in the wrong place, and I think the Ninth Circuit actually clarified that in the *Satterfield* opinion because they actually put the comma after the word "stored," and I think they did that with good reason.

Now, what's interesting is that the *Meyer* court, which is another TCPA Ninth Circuit opinion, which came three years after the *Satterfield* opinion -- the *Satterfield* opinion came out in 2009, and then the *Meyer* court came out in 2012. What the *Meyer* court -- and it was talking about dialers -- is the hardware when paired with certain software has the capacity to store or produce numbers and dialed those numbers at random in sequential order or from a database of numbers.

Now, a database of numbers is not in the definition of

the statute, but the Ninth Circuit on purpose added that language because they are clarifying what the word "store" means in the definition of what an ATDS is, and if we're going to stick with Ninth Circuit authority, and I don't think *Meyer* is necessarily inconsistent with *Satterfield*. I think it's going on and explaining what that meant and what the word "store" meant, and we have to follow the *Meyer* court.

Now, I think what's interesting is that the defense in their brief were talking about not giving the Chevron Deference to the FCC opinions. I don't think the *Satterfield* opinion, A, is inconsistent with 2003 and 2008 FCC opinions, and even if it wanted to, I don't think the Ninth Circuit at that particular time in 2009 had jurisdiction under the Hobbs Act to be able to overturn the FCC authority and the opinion.

Now, under Hobbs Act, 28 USC 2344, the court of appeals do have jurisdiction for a very limited period of time to overrule certain issues that are ruled upon by the FCC, but that time period is 60 days, and it has to be in a timely petition, and that issue has to be brought up before the court of appeals.

District courts, as was recently ruled upon in the Eleventh Circuit in the *Mais* case -- the Eleventh Circuit said the district court is bound by the Hobbs Act and the FCC opinions unless that particular issue in a timely manner under the Hobbs Act was appealed and overruled by the specific

circuit court, and that did not happen in the Ninth Circuit either for the 2003 opinions or the 2008 opinions.

Now, what's interesting about the 2003 opinions and the 2008 opinions is that in the 2003 they made it adamantly clear that -- any of the 2008 opinion -- that congress anticipated changes in technology and expected the FCC to guide and comment on the definition as technology progressed, which is exactly what's happening here.

So for us to hold that 1991 definition that congress enacted I think is against what the FCC is saying.

What the FCC says in 2003 is that, again, it's very similar to the *Meyer* opinion, which interestingly relied -- that I quoted for you earlier directly relied on a 2003 FCC opinion which said the hardware when paired with certain software has the capacity to store or produce numbers and dial those numbers at random in sequential order or from a database of numbers.

Again, the FCC and the Ninth Circuit are absolutely consistent with each other, and adding that additional language, which is not in the statute, but it's within the FCC's authority to explain what the statute means, and the Ninth Circuit agreed with it.

The 2003 opinion further went on, and it said the only thing that differentiates a normal dialer and a predictive dialer is the timing function. These machines are not

conceptually different from dialing machines without the predictive computer program attached, so though they are talking about a predictive dialer, and that's not at issue here, what the FCC is saying is that you have to look at the intent of congress, which is if you have a machine that has the capacity to send messages or phone calls to consumers without human intervention, and the word "human intervention" is used in the 2003 opinion --

THE COURT: Well, but you keep talking in the papers about "without human intervention." There's human intervention in this case to input the numbers in the first place. There's human intervention to draft the content of the messages. There's human intervention to say I want these messages to go to these specific inputted numbers. It's not just any old random generated numbers, I mean, right? There's human intervention at each of those stages.

MR. KAZEROUNIAN: Yes and no. If you look at a predictive dialer --

THE COURT: This isn't a predictive dialer.

MR. KAZEROUNIAN: It's not, but if we took that, meaning a predictive dialer would not be an ATDS because in a predictive dialer situation, a list of numbers are uploaded on to -- manually or like somebody has to program certain numbers to be uploaded to the dialer. That is human intervention, sure, but the machine after that automatically does what

congress was talking about.

THE COURT: Randomly grabs out numbers?

MR. KAZEROUNIAN: It can do or just send them in sequential order, and counsel said no Ninth Circuit circuit courts have taken this interpretation. That's incorrect because subsequent to the *Meyer* opinion, we had the *Gragg versus Orange Cab* case, which was cited in our papers, and what that case specifically said was, and I'm directing -- I am quoting directly from the case, "Machines used to dial telephone numbers from a list fall within this statutory definition of ATDS."

That's exactly what the -- that's exactly what that case said. And then we also -- it wasn't a published case, but we added as judicial notice to our papers the *Hernandez* case where Judge Conyers ruled the same way. He said if you have a list of numbers and you have some kind of machine that automatically dials them, that's an ATDS.

And that's exactly what we've got here in the Crunch case, Your Honor. Because it would be contrary to congressional intent if we started using semantics like commas or saying you know what? It doesn't generate -- it doesn't generate sequentially or randomly numbers because that is outdated, and that's not what congress meant because hardly any machines that I'm aware of, and I do this on a very regular basis, do that anymore, and the FCC has commented on that.

Technology has moved on, and in the 2003 FCC opinion it stated that that's outdated method of marketing. Nobody does that anymore. And we have to look at what congress wanted. If it's calling without human intervention automatically to consumers, that's got to be an ATDS.

THE COURT: Okay. Thank you.

Counsel.

MR. BALLON: Thank you, Your Honor. A lot of points to respond to.

Let me start at the beginning. I think probably the most important point is plaintiff's counsel's concession where he believes the Ninth Circuit was wrong in the *Satterfield* decision, and they didn't actually have authority to decide as they did that when the statute is unambiguous, you don't look past FCC rulings. The problem with that argument is that is an argument that needs to be addressed to the Ninth Circuit.

After summary judgment is granted, if the plaintiff chooses to appeal, that's really the venue to say that *Satterfield* is wrongly decided. I believe it's on point, and it's controlling, and I think it's very telling that plaintiff's argument really depends in part on telling the Court that the Ninth Circuit just -- they overlooked these FCC documents.

Now, plaintiff's counsel referred to the Hobbs Act, and the -- part of it is because the Seventh Circuit takes a

different approach to TCPA cases than the Ninth Circuit, but here in the Ninth Circuit, *Satterfield* is what controls.

But even if we were in the Seventh Circuit and the Seventh Circuit and Illinois cases that they cited which say that under the Hobbs Act, a court is bound to apply an FCC ruling, the Seventh Circuit cases that they cite, as we note in our reply brief, are very consistent in saying you only apply -- even in the Seventh Circuit, you only apply those FCC rulings if they're on point and controlling. And plaintiff's counsel conceded that what we're talking -- what they are referring to is a 2003 decision addressing predictive dialer with latent capability.

If you look at the -- if you look at the FCC rulings and you read through them, the FCC is very clear. They're not saying they're supplanting the statutory ruling. They still say you have to have the capacity to generate numbers. They're addressing a very specific context, which is predictive dialer, and that is not a predictive dialer. And so even under the Hobbs Act, you can't then expand it.

This is not like -- this is not the common law. If this were a negligence case, then you could look to language in a footnote, you could look to other things, and you could expand the common law. This is a statute. This is a statute from congress. The statute has been construed by the Ninth Circuit to say it's unambiguous and we have to apply it. And

to say that the Ninth Circuit was wrong, that we need to look to a footnote from an FCC decision and we should expand that further because the congressional intent was to read it broadly I think looks at things backwards.

We've got a statute. The FCC has limited jurisdiction to construe -- to address specific points. The CFR rule on what an ATDS does not include all of this language of human intervention, and getting back to the grammar of the statute itself, first of all, the Ninth Circuit did not change the grammar. I pulled up -- my colleague pulled up the case on the computer. The Ninth Circuit actually repeats the exact statute with the grammar from the statute, but then says that it's not storage, it's not production, and it's not sequential number generator.

And the point is it's none of the above. If you look at the statute, the statutory definition of "store or produce telephone numbers to be called using a random or sequential number," you could think of it as A or B plus C. It has to store or produce telephone numbers, and it has to be done using a random or sequential number generator. And the -- if we were to accept the plaintiff's definition, it would essentially write ATDS out of the statute. It would have been sufficient for congress to say that the statute applies any time numbers are stored. And that can't be the case because then why even -- why even have this broader definition of ATDS? If

storage alone were sufficient, then there wouldn't be an issue. And congress back in 1991 was not concerned with storage. They were concerned about marketers engaged in invasive telemarketing that was disruptive to people. And that kind of disruption doesn't come from -- doesn't come solely from storage. It's the generation of numbers randomly or sequentially and the storage or production. So it's A or B plus C.

But the Ninth Circuit in *Satterfield* did not change the grammar. And *Meyer* was a case where the defendant conceded that the technology at issue was a predictive dialer. So yes, it was a predictive dialer; therefore, the Ninth Circuit was correct to look at the FCC ruling addressing predictive dialer, but this is not a predictive dialer here, and so it's a different situation.

Similarly *Gragg V Orange Cab*, the plaintiff cited an earlier opinion in that case, motion to dismiss, where the Court said the plaintiff stated a claim and the case could go into discovery. What the plaintiff didn't say, and we didn't mention in our reply -- we only had ten pages, but since the plaintiff's counsel brought it up, I think it's important to alert the Court there was a subsequent decision in 2014, and in that case, as in this *Dominguez* case that we cited, and we think as in this case, the Court actually entered summary judgment for the defendant finding that there was no ATDS, and

we can provide the cite for that case. Again, it's 995 F.Supp.2d 1198. But I think -- and then *Hernandez* was a case involving a predictive dialer. So, again, if this were a predictive dialer case, then we would look to the FCC, but it's not a predictive dialer case, and we think that under *Satterfield,* we're entitled to summary judgment and that the *Dominguez* case that we cited, even though it's a case from Philadelphia, it applies Ninth Circuit law, and it reaches that same result.

The one other thing that I would just raise for the Court is we have moved to strike the plaintiff's experts declaration. That's been briefed. It's fully briefed. But I wanted to also just address that and whether -- whether the experts' testimony is excluded or included, we still believe either way we're entitled to summary judgment because it is, as the Court agreed -- it comes down to a legal question.

THE COURT: Okay. Thank you. You can expect a decision I would think in the next week or two, so -- at least on the motion for summary judgment.

Okay. Thank you very much.

MR. BALLON: Thank you.

(Proceedings concluded at 2:33 p.m.)

---000---

C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated November 14, 2014, at San Diego, California.

/s/ Dana Peabody
_____
Dana Peabody,
Registered Diplomate Reporter
Certified Realtime Reporter